

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH JOHN KINNEY,

Defendant-Appellant.

UNPUBLISHED
February 15, 2007

No. 265065
Wayne Circuit Court
LC No. 05-003709-01

Before: Kelly, P.J., and Davis and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of one count of assault with intent to commit murder, MCL 750.83, one count of felon in possession of a firearm, MCL 750.224f, and one count of possession of a firearm during commission of a felony (felony-firearm), second offense, MCL 750.227b. Defendant was sentenced as third habitual offender, MCL 769.10, to concurrent prison terms of 35 to 60 years for the assault with intent to commit murder conviction, and 4 to 7½ years for the felon in possession conviction, to be served consecutive to a five-year term for the felony-firearm conviction. Because the trial court did not abuse its discretion in admitting certain challenged evidence, and its admission of other challenged evidence was harmless, we affirm defendant's convictions, but we remand for resentencing due to improper scoring of the sentencing guidelines.

Defendant's convictions stem from an incident where he allegedly drove up to a house where Norman Molette, who had been in an altercation earlier that day with defendant's cousin, was in the yard. Defendant got out of the car, told Molette if he ran, defendant would kill him, shot Molette once, then, as Molette began to run, fired several more shots at him. Molette sustained four gunshot wounds to his abdomen and buttocks. Defendant was arrested in Alabama a little less than three years after the shooting.

Defendant first claims that the trial court improperly admitted "other acts" evidence. Specifically, defendant challenges the admission of evidence related to a previous felonious assault conviction and a separate carrying a concealed weapon (CCW) conviction. A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

MRE 404(b)(1) sets forth the standards for the admission of other acts evidence as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

For evidence to be admissible under MRE 404(b), it must be offered for a proper purpose, must be relevant, and its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than showing the defendant's propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994). The prosecutor has the burden of initially showing the evidence is relevant. *Knox, supra*, 469 Mich at 509. Evidence is unfairly prejudicial if there is a danger that marginally probative evidence will be given undue weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

At trial, retired Detroit police officer Arlie Lovier testified that he had contact with defendant in 1992 as a result of a shooting. Lovier testified that defendant signed a written statement containing answers to questions posed to him by Lovier and detailing the events leading up to the shooting. The statement contained information that defendant was advised that some guys who had held up a friend of his were at a local restaurant. Defendant went to the restaurant, approached the vehicle the guys were in, pulled his gun out and, when the driver made a "funny move" fired a shot into the car.

Given the similarities between the 1992 shooting that underlies the prior felonious assault and the current charge of assault, admission of the evidence regarding the 1992 conviction was relevant to the requisite state of mind. The evidence related to the 1992 shooting showed that defendant armed himself and approached some individuals who had allegedly robbed one of his friends, and then fired his firearm. Similarly in the case at hand, evidence was adduced that defendant armed himself with a gun and confronted the victim after an altercation with defendant's cousin, and then fired his firearm. What defendant did in both situations indicates a similarity in motive, and intent, i.e., to physically confront someone who had injured a person known to defendant. While there are differences between the two scenarios, the charged acts contained enough common features to show that defendant acted with a common plan or system in both incidents. See *People v Sabin (After Remand)*, 463 Mich 43, 63-64; 614 NW2d 888 (2000). At the very least, the degree of similarity gives rise to the reasonable argument that the evidence was relevant, thus placing admission of the evidence within a range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); *Sabin (After Remand)*, *supra* at 67.

Moreover, defendant argued in his opening statement that he had acted in self-defense. Again, given the degree of similarity between the charged acts and the 1992 shooting, admission of this other acts evidence was relevant to rebut a claim of self-defense.

With respect to balancing the probative value of evidence related to 1992 shooting against its prejudicial impact, the probative value of the evidence is high and the prejudice it engenders is in great part due to its relevance. To the extent that an improper character reference is possible, the court clearly instructed the jury at least twice how this evidence could and could not be used. “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, the trial court did not err in admitting evidence of the 1992 felonious assault.

Evidence related to defendant’s CCW conviction, however, presents a different situation. The fact that defendant had possessed a gun on that prior occasion is not relevant to the issue of intent or to rebut a claim of self-defense. “When other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts ‘are of the same general category.’” *VanderVliet*, *supra* at 79-80, quoting *Imwinkelried*, *Uncharged Misconduct Evidence*, § 3:11, p 23. While defendant’s prior CCW charge and the present charge of assault with intent to commit murder are both predicated on the use of a gun, this does not mean that they are of the same general category. In fact, CCW is a crime against the public order, whereas assault with intent to commit murder is a crime against a person. Evidence relating to defendant’s CCW charge should thus not have been admitted.

Nevertheless, the erroneous admission of such evidence was harmless given the multiple witnesses who saw defendant shoot the victim in broad daylight. Therefore, it does not require reversal of defendant’s convictions. See, *People v Young*, 472 Mich 130; 693 NW2d 801 (2005).

Defendant next claims that the trial court improperly admitted evidence that he was profiled on Comcast Detroit’s Most Wanted and that he moved to another state after the shooting, and that it improperly excluded evidence that the person who was charged as a co-actor in this case was acquitted. Again, a trial court’s decision whether to admit evidence is reviewed for an abuse of discretion. *Lukity*, *supra*.

The basis for admission of evidence that defendant was profiled on Comcast Detroit’s Most Wanted while he was out of the state is that defendant knew of the broadcast and knew that he would be arrested if he went back to Detroit. But this line of reasoning is pure speculation. The program was only available in Detroit to people who had subscribed to Comcast cable. And while defendant did have relatives in Detroit, there was no evidence presented that indicated that any of them even had cable, much less that any of them saw the program or communicated what was on it to defendant. Absent that, there is no foundation to enter defendant’s profiling on that program into the record. Therefore, it should not have been admitted. However, defendant fails to establish that any error in the admission of this evidence affected the outcome of the proceedings given the overwhelming weight of the other evidence adduced.

With respect to evidence of defendant’s move to another state, “[i]t is well established that in Michigan law that evidence of flight is admissible.” *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). “Such evidence is probative because it may indicate consciousness of guilt. . .” *Id.* Thus, the admission of defendant’s move to another state shortly after the shooting was not necessarily an abuse of discretion.

Defendant also sought to admit into evidence the fact that his co-actor (the cousin who had gotten into an altercation with Molette) was found not guilty of charges stemming from this

incident. Defendant argues this evidence mitigates any inference that defendant fled the state and remained out of state because of consciousness of guilt. We agree that knowledge that another person involved in the shooting was found not guilty is relevant to that point because it tends to negate the assertion that defendant remained in Alabama because he was concerned about being convicted were he to return to the state. While a codefendant's conviction is inadmissible to prove defendant's guilt, *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982), or conversely a codefendant's acquittal is inadmissible to prove innocence, defendant did not seek to admit this evidence to prove his innocence. See *VanderVliet*, *supra* at 73 ("Evidence that is admissible for one purpose does not become inadmissible because its use for a different purpose would be precluded."). Nevertheless, any potential error in admitting evidence that defendant moved to another state almost immediately after the shooting and failing to admit evidence of the co-actor's acquittal was harmless, given the eyewitness testimony concerning defendant's shooting of Molette.

Finally, defendant claims the trial court erred in the scoring of his sentencing guidelines when it scored defendant's conviction of two counts of felonious assault as high severity felonies instead of low severity felonies. We agree.

The sentencing guidelines take into account a defendant's prior criminal record. Here, defendant had previous convictions for felonious assault, which is a class F felony. MCL 777.16d. Class F felonies are low severity felonies. MCL 777.52(2). From the record, and as admitted by plaintiff, defendant's felonious assault convictions were improperly considered high severity felonies and resulted in 50 points being scored for prior record variable (PRV) 1. With those two counts properly classified as low severity, defendant's PRV score is 47, rather than the 77 points assessed, and places defendant at a PRV level of D instead of F. MCL 777.62. When properly scored, defendant's guideline range is 135 to 337 months, not the 225 to 468 month range given by the trial court. MCL 777.62; MCL 777.21(3)(b). Thus, defendant's minimum sentence of 35 years (or 420 months) exceeds the guidelines range by 83 months. Because the trial court apparently did not intend to exceed the guidelines range (or, if it did, provided no reasoning for an upward deviation), defendant is entitled to resentencing.

Defendant's convictions are affirmed. We remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Alton T. Davis

/s/ Deborah A. Servitto